INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	9
Conclusion	13

CITATIONS

Cases:

Aloe v. Lowe, 278 Ill. 233, 115 N.E. 862 ... 5, 10, 11

Aloe v. *Lowe*, 298 Ill. 404, 131 N.E. 612 ... 7, 10, 11

Barnes v. *Commissioner*, 408 F.2d 65, certiorari denied, 396 U.S. 836 ... 12, 13

Carr v. *Federal Trade Commission*, 302 F.2d 688 ... 13

Commissioner v. *Estate of Bosch*, 387 U.S. 456 ... 9, 10, 11

Helvering v. *Cement Investors, Inc.*, 316 U.S. 527 ... 13

Helvering v. *Wood*, 309 U.S. 344 ... 13

Lombard v. *Witbeck*, 173 Ill. 396, 51 N.E. 61 ... 4, 5, 7, 10

United States v. *Harris Trust and Savings Bank*, 390 F.2d 285, rehearing denied March 11, 1968 ... 8

Statutes:

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.), Sec. 811 ... 2

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-503

HARRIS TRUST AND SAVINGS BANK, individually, as Executor of the Estate of Gertrude Witbeck Hanlin and as Trustee, EVELYN P. GRICE, MARY T. GARVEY, JOHN A. LOWELL, II, BONNIE TORREY BERTKE, CLARENCE T. TORREY, JR. and MARGARET TORREY MCGRATH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1-4) is unofficially reported at 26 A.F.T.R. 2d 6089. The opinion of the court of appeals (Pet. App. 5-12) is unofficially reported at 29 A.F.T.R. 2d 1568.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1972. A petition for rehearing was denied on June 29, 1972. The petition for a writ of certiorari was

filed on September 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether decedent possessed, at the time of her death, an interest in a trust created by her grandfather which was includible in her estate for federal estate tax purposes.

2. Whether the court of appeals was correct in reversing and remanding the district court's judgment with instructions to enter judgment in favor of the government, rather than remanding the case for further factual findings.

STATUTE INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

STATEMENT

Decedent died testate on April 11, 1952, survived by five children. At the time of her death, decedent was the sole surviving income beneficiary of a trust created

by the will of her grandfather, Henry Witbeck, who died April 12, 1891. Decedent's executors filed a federal estate tax return which disclosed her interest in the trust, but they took the position that her interest was only a life estate, which terminated at her death and was therefore not includible in her estate for federal tax purposes. A deficiency was subsequently assessed for unpaid estate taxes on the ground that under Henry Witbeck's will, decedent possessed more than a life estate in the trust as of her death, and that indeed she owned a substantial portion of the trust res. (Pet. App. 1-2, 5-6.)

Witbeck's will provided that, with the exception of certain specific bequests, his entire estate was to be held in trust for the benefit of his wife, his son John, John's two children, and the three children of his deceased son George. George's children—Frank, Henry, and Gertrude (the decedent herein)—were named as the residuary legatees under the trust, with net income to be paid equally to the three of them as the trustees deemed in their best interest. Article 19 of the will directed the ultimate disposition of the trust estate as follows (Pet. App. 2, 7):

> I further provide and direct that in case of the death of either of my said three grandchildren Frank M. Witbeck, Gertrude H. Witbeck and Henry J. Witbeck leaving issue or descendants of issue them surviving and born in lawful wedlock, the one-third (1/3) share of all of my estate left for said last named three grandchildren, shall descend to such issue or descendants of issue of each child so deceased, such issue and descendants of issue

> to take Per Stirpes and not Per Capita *and in case any one or more of said last named three grandchildren shall die without leaving any such issue or descendants of issue, then said one third (1/3) share of my said residue estate shall go to the survivor or survivors of said last named three grandchildren.* And I further provide and direct that in case of the death of all three of said last named grandchildren without either of them leaving such issue or descendants of issue them surviving, then all of said estate hereby provided for such last named three grandchildren shall descend to my son John H. Witbeck and his heirs at law. [Emphasis added.]

The ambiguities attendant in the above-cited language gave rise to three Illinois Supreme Court decisions interpreting the Witbeck will. Upon the death of the first grandchild, Henry J. Witbeck, on June 16, 1896, intestate, unmarried, and without children, the trustees brought a construction suit to determine the disposition of grandson Henry's one-third interest in the property of the trust. The suit was brought to the Illinois Supreme Court and decided in *Lombard* v. *Witbeck*, 173 Ill. 396, 51 N.E. 61. The court held that Henry's share of trust personal property should descend to the two remaining grandchildren, absolutely, in equal parts. With respect to Henry's share of real property, however, the enjoyment of which was governed by a spendthrift clause, the court held that it was to remain subject to the control of the trustees, with eventual disposition to depend upon whether the remaining grandchildren died leaving issue. The court noted that

it did not need to resolve the question whether the survivors' interest was merely a life estate or a fee simple determinable (an interest which would ripen into a fee simple interest upon the death of either of the surviving grandchildren with children surviving them), since the only question at issue concerned the immediate disposition of the property. (Pet. App. 8.)

In 1909, Frank M. Witbeck, the second of the Witbeck grandchildren, died unmarried and without having had children. In 1898, his former wife Minnie had divorced him, and subsequently brought suit for the assignment to her of dower in her former husband's one-half share of grandson Henry's original one-third share of the trust real estate. (Pet. App. 7, 8.) The Illinois Supreme Court considered her claim in *Aloe* v. *Lowe*, 278 Ill. 233, 115 N.E. 862, which required that court to face squarely the question of the nature of the accrued interests held by the grandchildren. Under the Illinois Dower Act, the court noted, a surviving husband or wife could be awarded dower only where the deceased spouse was seized of an "estate of inheritance" during marriage—i.e., where property which was held by the deceased spouse was capable of being transmitted by him either inter vivos or at death. The court examined its prior opinion in *Lombard* and concluded (278 Ill. at 237-238, 115 N.E. at 864) that the language of the nineteenth clause of the will "created a base or determinable fee in Frank M. Witbeck and Gertrude H. Grice in the equitable share of the estate which would have gone to the issue of Henry J. had he died leaving issue." The court further noted that *Lombard* had decided the question

of the use of the property and not the nature of the underlying ownership interest held by the beneficiaries (278 Ill. at 238, 115 N.E. at 864). Finally, the court examined the effect of the gift over to the grandchildren's uncle upon the death of all three without issue surviving and the status of the accrued shares of each surviving grandchild who died with issue surviving (278 Ill. at 240-243, 115 N.E. at 865):

> This last provision is in the nature of an executory devise, and its effect is to cut down the devise just preceding from a fee simple devise to a base or determinable fee. These contingencies are thus provided for: Each one of said grandchildren takes a life estate in one-third of the residue, and if any of them die leaving issue such one-third goes to them; if one of them dies without leaving issue or descendants of issue such one-third share goes to the two survivors; and if one of the other two dies without issue such share so inherited by him goes to the other survivor. *In case the third grandchild dies leaving issue, such issue will take one-third of the residuary estate under the first part of the nineteenth clause as a remainder in fee, and they would take the other two-thirds by descent, unless their parent had in the meantime devised or conveyed such one-third.* In case all die without leaving issue surviving, the residue all descends to the heirs-at-law of John H. Witbeck.
>
> * * * * *
>
> A base or determinable fee in real estate is an estate of inheritance and descends to the heirs-at-

> law of the owner thereof, and, as before stated, the interest which Frank M. Witbeck inherited from his brother would have descended to his children if he had left any children and had not devised or conveyed such interest. It was a fee simple estate in him, subject to be determined by his dying without leaving issue or descendants of issue and a freehold of inheritance.* * * [Emphasis added.]

Since Frank's interest in Henry's share of the trust real estate was devisable by will and thus an "estate of inheritance," the court held that Minnie had a right to dower in this one-sixth interest.

Four years later, the Illinois Supreme Court was again faced with Minnie's right to dower in *Aloe* v. *Lowe,* 298 Ill. 404, 131 N.E. 612. On remand to the circuit court from the first *Aloe* opinion, the defense of *res judicata* had been successfully interposed against Minnie's claim on the basis of the earlier circuit court decree entered in conformance with the original *Lombard* opinion. In rejecting the lower court's rationale and result, the Illinois Supreme Court in the second *Aloe* opinion, leaving no doubt as to the meaning of its two previous decisions (298 Ill. at 405, 131 N.E. at 613), again held that the equitable interest of Frank M. Witbeck under the will of Henry Witbeck in the one-half of the one-third interest in certain real estate devised to Henry J. Witbeck, after the latter's death, was a determinable fee.

On June 16, 1964, the present suit was brought by the United States to collect the estate taxes assessed against decedent's estate. On February 17, 1967, the district court granted petitioners' motion to dismiss on

the ground that the government's complaint was barred by the statute of limitations. On appeal, the court of appeals held that the statute of limitations had been tolled during the pendency of an offer in compromise submitted by petitioners and that the government's suit had been timely filed. *United States* v. *Harris Trust and Savings Bank,* 390 F.2d 285 (C.A. 7), rehearing denied, March 11, 1968.

On remand, the district court denied the petitioners' motion for summary judgment and the government's motion for partial summary judgment and ordered that the case proceed to the merits on a stipulation of facts and briefs. The government moved to strike the affidavit of Daniel M. Schuyler (an opinion that as a matter of law decedent had only a life interest), a paragraph in the stipulation of facts referring to a hypothetical action of the Chicago Title and Trust Company, and the affidavit of Gilbert H. Scribner, Jr. (expressing his opinion as to the effect of the title company's hypothetical action on the value of the trust real property). In its Findings of Fact, Conclusions of Law, Memorandum, Order and Judgment, the district court granted the government's motion to strike the affidavits, but apparently took no action with respect to the stipulated paragraph.

The court entered judgment in favor of petitioners, holding that decedent's interest in the Witbeck trust "was absolutely certain to terminate upon her death, and one which she could not alienate by conveyance or devise" (Pet. App. 4) and that therefore she possessed no interest at her death properly includible in her estate for federal estate tax purposes. In view of the court's

disposition of this issue, it was not necessary for it to determine the value of decedent's asserted two-thirds interest in the Witbeck trust.

The court of appeals reviewed the decisions of the Illinois Supreme Court and held that the state court (Pet. App. 11)—

> has on three separate occasions declared that the same will involved in the present case is to be interpreted to result in two-thirds of decedent's trust estate being a base or determinable fee, an estate of inheritance, subject to conveyance or devise or descent, and subject to dower.* * *

This alienable interest, the court ruled, was properly includible in decedent's estate. Having so ruled, the court noted that the interpretation of the will made by a title company or a practicing attorney was immaterial and thus affirmed the striking of the affidavits. The court reversed and remanded with instructions to enter judgment for the government.

ARGUMENT

The decision below is correct and in accord with the mandate of this Court in *Commissioner* v. *Estate of Bosch,* 387 U.S. 456. The decision turns largely on the court's interpretation of state law and presents neither a conflict nor other reason for further review.

1. The decision below resolves a narrow question of Illinois law, with all other issues left undisputed by the parties. It has been stipulated by the parties (1) that decedent's original one-third interest in the Witbeck trust is a life estate, which cannot be included in

her estate; (2) that the nature of decedent's interest in the two thirds of trust corpus which passed to her upon the death of each of her brothers without leaving issue surviving is a question of state law to be determined by federal courts in accordance with the instructions of this Court in *Commissioner* v. *Estate of Bosch*, *supra*; and (3) that if decedent was able to control the disposition of this two-thirds interest in the Witbeck trust by will, then the value of that interest must be included in her gross estate for federal estate tax purposes.

As outlined above, the Illinois Supreme Court has never considered the very provisions of the Witbeck will at issue in the present case. In *Lombard* v. *Witbeck*, 173 Ill. 396, 51 N.E. 61, the court specifically declined to rule on the question whether the interest passing from a deceased grandchild to the survivors among them was to be held as a life estate or as a fee simple determinable—an interest capable of ripening into a fee simple absolute upon the death of the surviving grandchildren leaving living issue. In the two subsequent *Moss* v. *Lowe* cases, *supra*, however, the court did address itself directly to the question at issue in order to decide if Frank Witbeck, the second grandchild to die, had an estate of inheritance subject to conveyance or devise in which his former wife was entitled to dower. The court there held that Frank's interest in the share of trust property passing from his brother was a fee simple determinable rather than a life estate. In so holding, the court specifically re-

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Moss v. *Lowe*, 275 Ill. 230, 113 N.E. 962; *Moss* v. *Lowe*, 286 Ill. 404, 121 N.E. 682.

jected the argument raised by petitioners here (Pet. 10-13) that the 1898 circuit court decree fixed forever the devolution of trust property in a manner inconsistent with taxability in the instant case. Far from misapplying the guidelines of *Bosch* to the circumstances here, the court of appeals was clearly obligated to follow the interpretation of the Witbeck will enunciated and reiterated by the Illinois Supreme Court in its 1917 and 1921 opinions in *Aloe* v. *Lowe*, *supra*. Decedent, by leaving surviving issue, possessed a fee simple interest, includible in her gross estate.

2. Petitioners also challenge the court's action below in ordering judgment to be entered in favor of the government. The district court ordered that the case proceed to the merits on a stipulation of facts and briefs. In order to prove that even if decedent's interest in the Witbeck trust real property was taxable it had no value at the time of her death, petitioners relied upon (1) a paragraph in the parties' stipulation to the effect that a certain title company would not have issued a policy guaranteeing marketable title to any devisee of the decedent other than her children per stirpes and (2) the affidavit of a real estate expert stating that without such title insurance the fair market value of the trust real property was zero. Petitioners made no alternative argument, either at trial or on appeal, that the value of the trust real property, or the value of the trust personal property held as the proceeds of the sale of real property, employed by the Commissioner in assessing the estate tax deficiencies was erroneous in any respect, other than that it had not been reduced to zero.

The district court did not reach the question of valuation. On appeal, however, the government argued that if the substantive legal question were resolved in its favor and decedent were held to have had an alienable interest in two thirds of the corpus of the Witbeck trust, then judgment should be entered in the amount of the assessed deficiencies, since the legal basis of the hypothetical assumption that the title company would refuse to insure title would be removed. Under these circumstances, the presumptive correctness of the Commissioner's determination would remain unchallenged and judgment in the amount of the assessed deficiencies would be proper. See, *e.g.*, *Barnes* v. *Commissioner*, 408 F.2d 65, 68 (C.A. 7), certiorari denied, 396 U.S. 836, and cases cited therein. Petitioners, too, invited the court of appeals, in their briefs before that court, to make a final determination as to the value of decedent's interest in the trust real property. Presented with the case in this posture, the court below resolved all underlying legal questions favorably to the government and ordered that judgment be entered in its favor. At that point petitioners, for the first time in a petition for rehearing, argued that the case be remanded for further proceedings on the issue of valuation—suggesting, apparently, that some intermediate value between zero and the assessed valuation might be found. That petition was denied.

The court of appeals acted well within the bounds of proper judicial discretion in ordering judgment to be entered in favor of the government. It may appear, with the aid of hindsight, that petitioners would have been better advised in both the district court and in the

court of appeals to have introduced evidence or to have made an alternative argument either challenging the valuations of trust property employed by the Commissioner or establishing the existence of a cloud upon decedent's date-of-death title to the property which would render her interest less valuable. Petitioners, however, chose to gamble on an all-or-nothing approach. The court of appeals, having found the legal basis of petitioners' factual argument rendered immaterial by its primary holding, was thus faced with a situation in which the presumed correctness of the Commissioner's assessed deficiencies remained unchallenged. See, *e.g.*, *Barnes* v. *Commissioner*, *supra*. Petitioners may not now avoid the result which they specifically invited by their own litigating strategy. Cf., *Helvering* v. *Cement Investors, Inc.*, 316 U.S. 527; *Helvering* v. *Wood*, 309 U.S. 344; *Carr* v. *Federal Trade Commission*, 302 F.2d 688 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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